

CC-2010-008

May 04, 2010

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| Subject: Complying with E-Discovery Rules & Identifying & Preserving ESI | Cancel Date: Upon incorporation into CCDM |
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Chief Counsel Notice 2009-024, issued in August 2009, sets out the process for attorneys in the Office of Chief Counsel to follow in meeting their legal and ethical obligations regarding the discovery of electronically stored information (ESI) under the Federal Rules of Civil Procedure and the similar discovery rules issued by the Tax Court in January 2010. These obligations include issuing an appropriate litigation hold notice when litigation is initiated or can be reasonably anticipated and following up on that litigation hold to ensure that relevant ESI that may be responsive to a discovery request is collected and preserved.

Attorneys in Procedure and Administration are knowledgeable about the ESI process used in complying with the courts' discovery rules and are the contact point with the information technology staff who physically perform the actual work necessary to collect and preserve relevant ESI. In order to fulfill the Service's ESI obligations, the attorney assigned to a case covered by a court's ESI rules must comply with each of the six steps set out in Chief Counsel Notice 2009-024. As part of that process, the attorney assigned to the case compiles basic information on who was involved in the case and what type of ESI was created (e.g., mail, word documents, and excel spreadsheets), formulates search terms similar to those used in Westlaw or Lexis, and provides that information to PA. This information will be forwarded to the information technology staff who will use it to locate and identify ESI that may be relevant to the attorney's case. PA attorneys will act as the Office's primary interface with the information technology staff during the ESI collection and preservation process. At the conclusion of this process, the ESI that matches the search terms supplied to PA will be provided to the originating attorney for use in the attorney's case.

Following each of the steps described in Chief Counsel Notice 2009-024, including sending litigation hold notices to ensure that personnel search for and preserve all potentially relevant ESI and following-up with PA, as described above, is the best way to avoid both potential claims of spoliation and allegations of sanctionable conduct. Additionally, following the process of coordinating with PA and the information technology staff, and in particular the process with respect to the formulation and use of meaningful

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search requests, should greatly relieve our individual and collective burden with respect to the collection and preservation of relevant ESI that may be responsive to a discovery request.

Based upon our experience to date with ESI, Exhibits 1 through 3 of Chief Counsel Notice 2009-024 have been revised and the new versions of each exhibit are attached to this Notice.

PA Attorneys are available to assist in meeting our ESI-related obligations. Please contact PA Branch 6 (202-622-7950) or Branch 7 (202-622-4570) with any questions relating to the discovery of ESI.

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

Exhibit 1 - Initial Notification E-Mail

[The Initial Notification e-mail should be sent directly to Counsel employees and also to the identified Service point of contact. If the assigned attorney cannot identify an appropriate Service point of contact, the Initial Notification e-mail must be sent directly to those Service employees identified as having any involvement in a case to notify them of the litigation hold. A copy of this e-mail should also be sent to the Area Records Manager.]

Include the paragraph below if you are sending the Initial Notification e-mail to an identified Service point of contact:

We have identified you as the appropriate Service point of contact regarding [name of case] [in which litigation is reasonably anticipated] [which is pending in _____ court]. The Service point of contact is the IRS employee who is most familiar with this case, and would have additional knowledge about other IRS employees that may also possess relevant ESI. As the Service point of contact, please forward the remainder of this e-mail to all IRS employees whom you identify as possessing potentially relevant ESI, and informing them of their obligation to ensure steps are put in place to preserve their electronic records. Please be aware, you must also follow the litigation hold procedures outlined below for any relevant ESI you may possess regarding this matter.

Include the remaining language below to the Service point of contact, Counsel employees, and other Service employees you are contacting directly:

You are receiving this e-mail because you have been identified as a person may have potentially relevant information to the matter of [name of case] [in which litigation is reasonably anticipated] [which is pending in _____ court].

[Provide details regarding the nature of the litigation or anticipated litigation, including time periods involved and allegations or subject matter.]

Under the Federal Rules of Civil Procedure, the Service has an obligation to search, identify, preserve, and isolate all electronically stored information (ESI) potentially relevant to the above-described matter. Generally, ESI includes, but is not limited to: all e-mail and attachments; word processing documents, spreadsheets, graphics and presentation documents, images, text files, and other information stored on hard drives or removable media (e.g., desktops, portable thumb drives and CDs), meta-data, databases, instant messages, transaction logs, audio and video files, voicemail, webpages, computer logs, text messages, and backup and archived material.

Although we do not need you to gather the ESI at this time, please ensure that steps are put in place so that this information is preserved. Under no

circumstances should this information be destroyed until this matter is completed or a litigation hold is lifted.

The destruction of ESI could result in judicial sanctions against the agency and you personally.

Please provide an e-mail response to this e-mail **within seven business days** stating that you have received notice of the litigation hold and are aware that all ESI must be preserved. In that email, please also provide your SEID. If you are the Service point of contact, please identify those employees (and their SEIDs) to whom you forwarded the litigation hold notice and what role those employees had in relation to the case. Please also provide (the Service point of contact/this office) with the names and positions of anyone else you know who was involved in this case, including managers and those who may have left the Service, their positions then and now, if different.

In the event that you have received this e-mail and after a search of your records you determine that you were not involved in any way in this matter (or you are not the appropriate Service point of contact), please provide an e-mail response to this e-mail **within seven business days** informing the sender you were not involved in the case or the subject matter involved in the suit.

Please feel free to contact me if you have any questions or concerns.

Exhibit 2 – Second Notification E-mail

[After receiving responses to the Initial Notification e-mail, the assigned attorney must send a Second Notification e-mail directly to Counsel employees who affirmatively respond that they possess relevant ESI. This Second Notification e-mail must also be sent to the Service point of contact with instructions to send it to those Service employees who affirmatively responded that they may possess relevant ESI.]

Include the paragraph below in the Second Notification e-mail to the Service point of contact:

As the Service point of contact, please complete the questionnaire below and return it to me within ten business days. Also, please forward the remainder of this e-mail to those IRS employees you previously identified as possessing relevant ESI in the _____ matter, with instructions to return this information to you within ten business days. Please forward responses from identified IRS employees to me.

Include the remaining language below to the Service point of contact, Counsel employees, and other Service employees you are contacting directly:

You have acknowledged that you were involved in the _____ matter and may have documents and electronically stored information (ESI) related to this case that may be subject to discovery. Our office is sending you this e-mail to try to identify the types of ESI you may have, whether the ESI is readily accessible or whether access to the information is going to require further IT assistance and/or time, and to instruct you to search, identify, preserve and isolate the ESI. Please provide an e-mail response to this e-mail within ten business days of receiving it.

In your e-mail, please indicate whether you created ESI of the following types while working on this case.

- 1 E-mail and attachments
2. Microsoft Office Suite documents (e.g., word documents, excel spreadsheets, powerpoints)
3. ESI maintained in any other program, application, system or database – please specify.

Once you have identified the types of ESI you may have created, please conduct a specific search and identify any ESI to which you have access. Please send me an e-mail with a description of the results of your search. Please indicate in the e-mail the timeframe during which the ESI was created and your post of duty at the time you created the ESI.

Once located, the ESI needs to be preserved and isolated. Preservation of ESI means that the ESI cannot be altered or destroyed and must be maintained in its native format throughout the duration of this matter. This means that all normal retention schedules related to the ESI have been suspended until such time as the ESI is isolated. ESI is isolated when a mirror image of the ESI in its native format is created and moved to a separate drive, CD, or server for storage for the duration of the litigation. This office will coordinate with the IRS's IT personnel to have the ESI you identified isolated and preserved. In the meantime, do not alter or destroy the ESI. The destruction of ESI could result in judicial sanctions against the agency and you personally.

If you are unable to execute any steps in this process (search and identify), please contact the undersigned immediately

Also in your e-mail response please indicate whether any of the ESI is maintained offline, that is, on any external drive or storage device (e.g., CDs or flash drives).

Please keep a detailed record of:

- All hardware searched;
- Specific ESI located, and where; and
- Search terms used.

For each of the types of ESI located, please describe the search you conducted to locate the ESI (keyword, name of taxpayer, EIN), where it was located, name of the application, program, system or database and steps taken to preserve the ESI.

Exhibit 3 -- Litigation Hold Notice and Request for Search & Preservation

MIT,

The IRS is involved in a matter [in litigation, ____ v ____, case number ____ in the (United States District Court for the District of ____) (United States Tax Court)] [in which litigation is anticipated involving ____]. The Office of Chief Counsel has determined that a litigation hold should be implemented to suspend the retention schedule to prevent the destruction of ESI until such time as that information has been located and transferred in its native format for preservation. The Office of Chief Counsel is requesting a search be initiated by your office to locate, isolate, and store copies of the information in its native form requested below.

Type of Litigation: ☐ Tax ☐ Personnel ☐ Procurement ☐ Other

Requester's Information

Name:
Office
Telephone No.:
E-mail:

Alternative Contact

Name:
Office:
Telephone No.:
E-mail:

Information Requested

☐ If checked see attached list for additional information and/or search combinations.

Name & SEID of employee who created ESI: _____

Dates during which employee created ESI: _____

Post of duty of employee during which ESI created: _____

Please search:

- ☐ E-mail
- ☐ Microsoft Office Suite Documents
- ☐ Other program(s), application(s), system(s) or database(s): [please specify]

Please search the ESI for the following terms:

Please search for all of the above both individually and in all combinations.

Please also specifically search the following combination of terms: